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No. 98-570

FILED
NOV 13 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

BANK OF CHINA,

Petitioner,

vs

VOEST-ALPINE TRADING USA CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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In Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Bank of China[1], Respondent argues a new point, i.e. that the Petition herein is based, not upon the split in the circuits on a controlling issue of law as expressly acknowledged by the Fifth Circuit in its decision below, but rather upon Petitioner's disagreement with "factual findings" made by the District Court and the Fifth Circuit concerning Petitioner's letter of credit.[2] (Opp'n Br. at 1.)

Both decisions below, as well as the record on appeal, demonstrate that Respondent's argument is incorrect.

THE PETITION IS BASED NOT UPON DISAGREEMENT WITH ANY "FACTUAL FINDINGS" MADE BELOW BUT RATHER UPON THE FIFTH CIRCUIT'S ERRONEOUS AND CIRCUIT-SPLITTING CONCLUSIONS OF CONTROLLING LAW.

This case comes to this Court from the Fifth Circuit's affirmance of the District Court's denial of Petitioner's Fed. R. Civ. P. 12(c) motion for judgment on the pleadings to dismiss the Complaint for lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1604.

Because Petitioner's motion was for judgment on the pleadings, Petitioner, the District Court, and the Fifth Circuit

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1. For Petitioner's statement pursuant to Sup. Ct. R. 29.6, please see the Petition for Writ of Certiorari.

2. The decision of the United States Court of Appeals for the Fifth Circuit is set forth at pages 1a-22a of the Appendix to the Petition. The decision of the United States District Court for the Southern District of Texas is set forth at pages 23a-29a of the Appendix to the Petition.

were all required to assume the truth of the facts as stated in Respondent's Complaint and annexed exhibits.[3] Accordingly, Petitioner could not and did not dispute any assumed facts in the lower courts and certainly does not do so in its Petition in this Court. By the same token, neither the District Court nor the Fifth Circuit could or did make any "factual findings," as Respondent now asserts.[4]

The assumed facts are set forth in the Fifth Circuit's decision (App. at 3a-4a) and may be briefly stated as follows.

In July 1995, Petitioner's Sub-branch in Jiangyin, China, issued a letter of credit for the benefit of Respondent. The letter of credit required proper presentment of Respondent's documents and drafts to the Sub-branch in China and did not designate a particular place of payment.[5] (App. at 3a.)

In August 1995, Respondent's bank, Texas Commerce Bank ("TCB") in Houston, Texas, forwarded the documents to the Sub-branch, together with a cover letter requesting the Sub-branch's (i) notification of any discrepancies or (ii) confirmation of acceptance of the documents for payment and transmission of payment by wire to TCB in Texas. (App. at 4a.)

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3. The exhibits annexed to Respondent's Complaint (Doc. 40, pp. 1-8) included, *inter alia*, Petitioner's letter of credit (Doc. 40, pp. 9-10) and Respondent's bank's cover letter (Doc. 40, p. 17) upon which the decisions below were based.

4. Respondent concedes this point at the end of its Opposition Brief. (Opp'n Br. at 8 n.8.)

5. In fact, the letter of credit stated that the Sub-branch would "pay upon receipt of documents and drafts all in order." (Doc. 40, p. 10.)

Thereafter, the Sub-branch notified TCB of discrepancies in the documents and later declined to make payment. (App. at 4a.)

Applying the law to these assumed facts, the Fifth Circuit majority held that Respondent's failure to receive funds from Petitioner caused a sufficient "direct effect" in the United States to support application of the "commercial activity" exception to immunity set forth in 28 U.S.C. § 1605(a)(2). (App. at 19a.)

Significantly — and contrary to Respondent's Opposition argument (Opp'n Br. at 3) — neither the District Court nor the Fifth Circuit made a "factual finding" that Petitioner was contractually obligated to make payment in Texas, nor did they "find" that TCB's cover letter request for payment to be sent by wire to Texas was in any way binding upon Petitioner. (App. at 3a-4a, 17a-18a, 28a.)[6]

On the contrary, in the view of both the District Court and the Fifth Circuit majority, it was the fact of Respondent's financial loss in the United States in the form of funds not remitted by Petitioner from China that supported the "direct

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6. Respondent's argument concerning the free negotiability of the letter of credit under Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce, Publication No. 500 ("UCP 500") ignores both that the letter of credit itself required presentation of documents in China (App. at 3a, Doc. 40, p. 10), which thereby remained the place of performance and payment, and that TCB did not "negotiate" Respondent's documents in Texas but instead "presented" Respondent's documents "for negotiation" in China (Doc. 40, p. 17). (UCP 500 is reproduced in its entirety as Appendix C to J. Dolan, *The Law of Letters of Credit: Commercial and Standby Credits* (rev. ed. 1996).)

effect" exception. (App. at 17a-18a, 28a.) As the Fifth Circuit majority stated:

> Because a financial loss was incurred in the United States by an American plaintiff as an immediate consequence of the foreign state's commercial activity abroad, the loss constituted a direct effect within the scope of the third clause of the commercial activity exception. We, therefore, affirm.

App. at 2a-3a.

As discussed in the Petition (Pet. at 7-15), the Fifth Circuit's ruling in this case places it in direct conflict with the Second, Eighth, Ninth, Tenth, and District of Columbia Circuits and extends application of the "direct effect" immunity exception far beyond the limits of this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

In *Weltover*, Argentina issued bearer bonds that specified four places of performance and payment, including New York. Plaintiffs in that case chose New York and, when Argentina refused to pay on time, brought suit. This Court declared:

> Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming.

504 U.S. at 619.

In this case, however, the United States was not the situs of any "ultimate contractual obligations" on Petitioner's part but was rather the situs of Respondent's ultimate financial loss. This was not a matter of "factual dispute" in the courts below

and is not in dispute here. Rather, Petitioner disputes the Fifth Circuit majority's legal conclusion that such financial loss alone supports application of the commercial activity exception as being contrary to this Court's decision in *Weltover*, to the controlling law of five other Courts of Appeals, and to the FSIA itself.

As Judge Reavley stated in his "concurring" opinion below (App. at 20a-22a), the effect of the Fifth Circuit majority's decision in this case is that the "mere financial loss" of an American plaintiff would obviate any need to demonstrate the "direct effect" required by the FSIA commercial activity exception, thereby permitting the exception in large measure to swallow the rule:

> My own reading of the [FSIA] would be that a consequential loss, the result and not an element of the claim itself, is less than "direct." If the mere financial loss resulting from the breach or tort satisfies the statute, an American plaintiff need prove only commercial activity. Perhaps that was the intent of Congress, but I agree with the other circuits. As the Tenth Circuit said in *United World Trade, Inc. v. Mangyshlakneft Oil Production Association*:
>
> > Nor is the fact that [plaintiff United World Trade, Inc.] is an American corporation that suffered a financial loss sufficient to place the direct effect of the defendants's actions "in the United States." Appellant would have us interpret § 1605(a)(2) in a manner that would give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen . . . claims to have suffered a loss from the acts of a foreign

> state. We think that the language of § 1605(a)(2) limiting jurisdiction to cases where there is a "direct effect" in the United States makes it unlikely that this was Congress' intent.

App. at 20a-21a, *citing United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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